Supreme Court of the United States.

CROWLEY, CHIEF OF POLICE *v.* CHRISTENSEN.

Every citizen may pursue any lawful trade or business under lawful restrictions imposed upon all persons of the same age, sex and condition, which are deemed essential by the local authority to the safety, health, peace, good order and morals of the community.

A citizen has no inherent right to sell liquor at retail, and the police powers of the State can be exercised in its restraint or prohibition without raising any question of Federal law from a supposed lawfulness of the business.

The case of *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356, distinguished on the ground that the laundry business was harmless in itself, and useful to the community, while the retail liquor business could not be carried on without a license, which might be refused without violating any inherent right of a citizen.

Appeal from an order of the Circuit Court of the United States for the Northern District of California, discharging Henry Christensen from the custody of the Chief of Police of the City and County of San Francisco.

J. D. Page and *Davis Louderback*, for appellant.

Joseph D. Redding and *Alfred Clarke*, for appellee.

FIELD, J., November 10, 1890. This is an appeal from an order of the Circuit Court of the United States for the Northern District of California, discharging, on *habeas corpus*, the petitioner for the writ, the appellee here, from the custody of the Chief of Police of the City and County of San Francisco, by whom he was held, under a warrant of arrest issued by the Police Court of that municipality, upon a charge of having engaged in and carried on in that City, the business of selling spirituous, malt and fermented liquors and wines, in less quantities than one quart, without the license required by the ordinance of the City and County.

The ordinance referred to provides that every person who sells such liquors or wines in quantities less than one quart shall be designated as "a retail liquor dealer" and as "a grocer and retail liquor dealer"; and that no license as such

liquor dealer, after January 1, 1886, "shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the Board of Police Commissioners of the City and County of San Francisco, to carry on or conduct said business, but, in case of refusal of such consent, upon application, said Board of Police Commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocery and retail liquor dealer is to be carried on"; and that such license shall be issued for a period of only three months. The ordinance further declares that any person violating this provision shall be deemed guilty of a misdemeanor.

The Constitution of California provides, in the eleventh section of Article XI, that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The petitioner had, previously to June 10, 1889, carried on the business of retail liquor dealer in San Francisco for some years, under licenses from the Board of Police Commissioners, but his last license was to expire on the seventeenth of that month. Previously to its expiration, he was informed by the Police Commissioners that they had withdrawn their consent to the further issue of a license to him. He afterwards tendered to the collector of license fees, through which officer it was the practice of the Board to issue the licenses, the sum required for a new license, but the tender was not accepted, and his application for a new license was refused. He then applied to the Police Commissioners for a hearing before them on the question of revoking their consent to the issue of a further license to him. Such hearing was accorded to him, and the time fixed for it was the twenty-fourth of June. But before any hearing was had, he was arrested, upon a warrant of the Police Court, upon the charge of carrying on the business of a retail liquor dealer without a license. He then obtained from the Supreme

Court of the State, a writ of *habeas corpus* to be discharged from the arrest, but that Court, on the second of August, 1890, held the ordinance valid, and remanded him to the custody of the Chief of Police (24 Pac. Repr. 747). He then applied for the allowance of an appeal from this order to the Supreme Court of the United States, but it was refused by the Chief Justice of the State Court, and the Associate Justice of the Supreme Court of the United States assigned to the circuit, who could have allowed the appeal, was absent from the State.

On the seventh of August following, a new complaint was made against the petitioner, charging him with unlawfully engaging in and carrying on in San Francisco, the business of a retail liquor dealer without a license under the ordinance of the City and County. Upon this complaint, a warrant was issued, under which he was arrested. He thereupon applied to the Circuit Court of the United States for a writ of *habeas corpus*, which was issued. In return to the writ, the Chief of Police, the appellant here, stated that he held the petitioner under the warrant mentioned by the petitioner, and several other warrants issued by the Police Court of the City and County, upon different charges, made at different times, of his conducting and carrying on the business of a retail liquor dealer in San Francisco without a license, as required by the ordinance of the City and County. He also stated, among other things, that a further license to the petitioner was refused by the Police Commissioners, because they had reason to believe that the business was carried on by him under his existing license in such a manner as to be offensive, and violative of the criminal laws of the State, and of the rights of others. In support of this charge, it was averred that in that business the petitioner was assisted by one whom he represented and claimed to be his wife, and that she had on one occasion stolen $160 from a person who visited his saloon, and been convicted of the offense in the Superior Court of the City and County, and sentenced to be imprisoned for one year, and on another occasion had stolen a watch and a scarf-pin from a person at the saloon, and was

held to answer for the charge. It was also averred that there were more than sixteen citizens of San Francisco owning real estate in the block on which the petitioner carried on his business.

It does not appear that, on the hearing of the application, any proof was offered of the facts alleged either in the petition or in the return. The case was heard upon exceptions or demurrer to the return. To that part respecting the alleged larceny by the wife and her conviction, the demurrer was on the ground that the return also showed that an appeal had been taken from the conviction, which was then pending, and that she might be acquitted of the offense charged. Several objections were urged by the petitioner to the ordinance. Some of them were of a technical character, and could not be considered. Of the others, only one was noticed, which was that by it "the State of California, by its officers, denies to him the equal protection of the laws, and makes and enforces against him a law which abridges his privileges and immunities as a citizen of the United States," contrary to the Fourteenth Amendment of the Constitution of the United States. The Court held that the ordinance made the business of the petitioner depend upon the arbitrary will of others, and in that respect denied to him the equal protection of the laws, and accordingly ordered his discharge (*infra*, and also reported in 43 Fed. Repr. 243). From the order, the case is brought to this Court by appeal, under sections 763 and 764 of the Revised Statutes, this latter section as amended by the Act of March 3, 1885, ch. 353 (23 Stat. at Large 437).

It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the

greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man; but this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid, and what void and voidable, when they shall be in writing, and when they may be made orally, and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And, as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non lædas* is a maxim of universal application.

For the pursuit of any lawful trade or business the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured or sold, require also special qualifications in the parties permitted to use, manufacture or sell them. All this is but common knowledge, and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors.

It is urged that as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is

not properly matter for legislation. There is in this position an assumption of a fact which does not exist—that, when the liquors are taken in excess, the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property, and general demoralization, it affects those who are immediately connected with and dependent upon him.

By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram-shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may

deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State, or one which can be brought under the cognizance of the courts of the United States.

The Constitution of California vests in the municipality of the City and County of San Francisco the right to make "all such local, police, sanitary and other regulations as are not in conflict with general laws." The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested, and is held in custody, was thus authorized, and is valid. That decision is binding upon us, unless some inhibition of the Constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned Circuit Judge saw in the provisions of the ordinance empowering the Police Commissioners to grant or refuse their assent to the application of the petitioner for a license, or, failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which his business as a retail dealer in liquors was to be carried on, the delegation of arbitrary discretion to the Police Commissioners, and to real estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356.

In that case it appeared that an ordinance of the City and County of San Francisco, passed in July, 1880, declared that it should be unlawful after its passage "for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed

either of brick or stone." The ordinance did not limit the power of the Supervisors to grant such consent, where the business was carried on in wooden buildings. It left that matter to the arbitrary discretion of the Board. Under the ordinance, the consent of the Supervisors was refused to the petitioner to carry on the laundry business in wooden buildings, where it had been conducted by him for over twenty years. He had at the time a certificate from the Board of Fire Wardens that his premises had been inspected by them, and upon such inspection they had found all proper arrangements for carrying on the business, and that all proper precautions had been taken to comply with the provisions of the ordinance defining the fire limits of the City and County; and also a certificate from the Health Officer that the premises had been inspected by him, and were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with.

The limits of the City and County embraced a territory some ten miles wide, by fifteen or more in length, much of it being occupied at the time, as stated by the Circuit Judge, as farming and pasture lands, and much of it being unoccupied sand-banks, in many places without buildings within a quarter or half a mile of each other. It appeared also that, in the practical administration of the ordinance, consent was given by the Board of Supervisors to some parties to carry on the laundry business in buildings other than those of brick or stone, but that all applications coming from the Chinese, of whom the petitioner was one, to carry on the business in such buildings were refused. This Court said of the ordinance:

> It allows, without restriction, the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the Supervisors, and on the other those from whom that consent is

withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the Supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the Board of Supervisors with reference to a business harmless in itself and useful to the community, and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the City may prescribe.

It would seem that some stress is placed upon the allegation of the petitioner that there were not twelve persons owners of real property in the block where the business was to be carried on. This allegation is denied in the return, which alleges that there were more than sixteen such property holders. As the case was heard upon exceptions or demurrer to the return, its averments must be taken as true.

At common law, no evidence was necessary to support the return. It was deemed to import verity until impeached: Hurd, Hab. Corp. bk. 2, ch. 3, §§ 8–10; Church, Hab. Corp. § 122. And this rule is not changed by any statute of the United States. It must therefore be considered as a fact in the case that there were more than sixteen owners of real estate in the block. But if the fact were otherwise, and there was not the number named in the petition, the result would not be affected. If there were no property holders in the block, the discretionary authority would be exercised finally by the Police Commissioners, and their refusal to grant the license is not a matter for review by this Court, as it violates no principle of Federal law. We, however, find in the re-

turn a statement which would fully justify the action of the Commissioners. It is averred that, in the conduct of the liquor business, the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offense, and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted for the exercise of the discretion of the Police Commissioners in refusing a further license to the petitioner.

The order discharging the prisoner must be reversed, and the cause remanded, with directions to take further proceedings in conformity with this opinion. And it is so ordered.

[While the subject of liquor sel ing would be the first suggested for an annotation to the foregoing case, the power by which the final determination of the rights of a liquor seller is reached, affords an equally apt subject, and the following interesting statement of the effect of the Fourteenth Amendment can best be read in immediate connection with the pregnant sentences of Justice FIELD'S opinion.—ED.

Among the engrossing topics of the reconstruction period, that which most largely engaged public attention was the great increase of representation that the South was to secure by the manumission of the slaves. The North did not look with favor upon the additional two-fifths representation which accrued in the Southern States as a result of the Civil War. In justice to the loyal States, and in justice to the recently emancipated negro, a new and different basis of representation was demanded.

The obvious necessity of amending the Constitution in this respect was first suggested in Congress by Mr. Thaddeus Stevens, December 5, 1865. Early in the following year the subject was again brought forward by Mr. Spaulding, of Ohio, Mr. Blaine and others, and various forms of the Amendment proposed. Long and earnest debates ensued in both houses, the issues being confined almost exclusively to the matter of readjustment.

On the 30th of April, 1866, a joint resolution was reported from the Committee on Reconstruction proposing an Amendment to the Constitution of the United States, the form of which, as then submitted, was the first incomplete draft of the Fourteenth Amendment. The question of the change of the basis of representation was the leading feature of the Amendment, but discussion had developed the necessity for incorporating other matters, closely allied to the main issue, and essential to the work of reconstruction.

The threatened abridgement of the rights of the negro had led to a declaration, perhaps unnecessary, of the rights of a citizen of the

United States; and the meaning of the term "citizen" had evoked the final amendment to the first section, the definition of national citizenship. The Fourteenth Amendment in its completed form was finally adopted by Congress on the 13th day of June, 1866, and in due time was ratified by the various States.

The second, third and fourth sections of the Amendment fully met the temporary emergency for which they were designed, and are now practically historical records of a momentous period. The first section, though called into being by the same spirit of necessity, has, in its general adaptation to all persons and all times, the elements of perpetual life. Its scope was but imperfectly realized upon its adoption. It seemed only a part of the reconstruction legislation. When the Supreme Court of the United States, six years later, approached the consideration of this first section, the magnitude of the questions involved in its construction became evident. "We do not conceal from ourselves the great responsibility which this duty devolves upon us," says Justice MILLER. "No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of the country, and so important in their bearing upon the relation of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this Court during the official life of any of its present members": *Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 36, 67.

In the *Slaughter House Cases*, the Court attempted to limit the application of this section, by rules of close construction; but—notwithstanding the prudent disinclination of the Supreme Bench to interpret its terms too liberally, the generous scope of its provisions has of later years offered to citizens of every class, at least the hope of relief from the oppressive legislation of the State.

The decisions construing its provisions grow more numerous every year, as their beneficent nature is unfolded by the Courts in the effort to restrain the enforcement of selfish and discriminating laws. Every part of the section has, to a greater or less extent, been considered by the Supreme and Federal Courts, so that it is possible to discuss the adjudications upon each provision in the order stated in the Amendment. The whole section reads as follows (according to the text of Poore's Charters and Constitutions, page 123):

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first authoritative interpretation of the Amendment was had in the *Slaughter House Cases*, decided in 1873. Each clause was elaborately discussed by a divided Court, as evidenced by three remarkably able dissenting opinions. The construction of the various provisions of the section as then adopted,

though tacitly modified in some respects, remains to-day as the authoritative exposition of the meaning and applications of its terms:

First: Citizenship.

This clause declares what shall constitute citizenship of the United States as well as citizenship of the State.

A distinction, however, is recognized between National and State citizenship in the *Slaughter House Cases.* A citizen of a State is always a citizen of the United States, but the converse is not necessarily true. Residence in the State is a pre-requisite of State citizenship, but is not essential to National citizenship. Citizenship of the United States is primary: that of a State, secondary. The Amendment makes the citizenship of the United States and of a State dependent on the place of birth or fact of adoption. [See also a leading article on Citizens, their Rights and Immunities, 27 AMERICAN LAW REGISTER 539.

Second: Privileges and Immunities.

Precisely what are the "privileges and immunities" that appertain to a citizen of the United States does not appear to be definitely settled. The question was exhaustively discussed in the *Slaughter House Cases,* and upon this point there was the greatest divergence of opinion.

Justice MILLER, speaking for the majority of the Court, cites the cases of *Corfield* v. *Coryell* (1823), 4 Wash. C. C. 371; *Ward* v. *Maryland* (1871), 12 Wall. (79 U. S.) 418, 430, and *Paul* v. *Virginia* (1869), 8 Wall. (75 U. S.) 168, 180, to show that the fundamental rights of citizens of all free governments belong to that class which the State governments were created to establish and secure.

"With the exception of a few restrictions," says the learned Justice, "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? * * * And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow if the proposition of the plaintiffs in error be sound": *Slaughter House Cases* (1873), 16 Wall. (83 U. S.) 30, 77.

The Court having demonstrated that to the States belong the exclusive domain of civil rights, proceeds to enumerate some of the privileges and immunities that belong to a citizen of the United States as such.

Among them are the right of access to the seat of government, seaports and treasuries, land offices and courts of justice; the right to demand the protection of the Government when on the high seas, or in a foreign country; the right of petition and the privilege of the writ of *habeas corpus.*

It was on this point that the most radical differences existed between the majority and the minority of the Court. Justice FIELD

expresses his dissent from these views in the following terms; "The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the Court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution, or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. * * * But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence": *Slaughter House Cases* (1873), 16 Wall. (83 U. S.), 30, 96.

The learned Justice then points out that Congress had in the first section of the Civil Rights Act, passed before the Fourteenth Amendment, enumerated some of the rights intended to be protected by the Constitution. The rights thus defined were the natural and inalienable rights that pertain to every citizen, and take their origin from a higher source than government.

Justice BRADLEY concurring in the opinion of Justice FIELD, discusses fully the fundamental rights of the citizen, and maintains that while a State may regulate those rights, it cannot subvert them. "To say that these rights and immunities attach only to State citizenship and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history, and the rights of men, not to say the rights of the American people": Id. 116.

"The privileges and immunities of a citizen of the United States," says Mr. Justice SWAYNE, "include among other things, the fundamental rights of life, liberty and property, and also the rights which pertain to him by reason of his membership of the Nation": Id. 126.

It is interesting to note the preponderant influence of these dissenting opinions in the *Slaughter House Cases* upon the subsequent interpretation of another portion of the section. The inhibition against the denial of the equal protection of the laws to any *person*, is so comprehensive in its scope, that the clause relating to "privileges and immunities" has had little occasion to offer its special protection to citizens of the United States. Persons, whether citizens or not, who deemed their "privileges and immunities" abridged by the laws of a State, have claimed "the equal protection of the laws." Whether the narrow construction of the term "privileges and immunities" by the majority of the Court, has discouraged the invocation of the protection of this clause, cannot be determined; but the comparatively few cases involving its construction is somewhat significant.

In *Walker* v. *Sauvinet* (1876), 2 Otto (92 U. S.) 90, the Court adheres to its close construction in

holding that a trial by jury in suits at common law in the State courts, is not a privilege or immunity of National citizenship which the States are forbidden by the Fourteenth Amendment to abridge. So, in *Presser* v. *Illinois* (1886), 116 U. S. 252, it was held that the right voluntarily to associate together as a military company or organization, or to drill and parade with arms, without and independent of an Act of Congress, or law of the State governing the same, is not an attribute of National citizenship. And, therefore, the prohibition by a State of such an act, is not an abridgement of the privileges and immunities of a citizen of the United States.

The Court yielded slightly to the opinion of the minority in *Strauder* v. *West Virginia* (1880), 10 Otto (100 U. S.) 303. A negro was indicted and convicted by a jury impanelled under the law denying to colored citizens the right to serve as jurors. While this case involved more particularly the construction of another portion of the section, STRONG, J., maintains in the course of his opinion, that the Amendment secured to a race recently emancipated all the civil rights that the superior race enjoys. In holding that the law was unconstitutional, the Court did not say that the denial of the right to colored citizens to serve as jurors was a denial of the privileges and the immunities of a citizen of the United States, as such. The peculiar application of the Amendment to the colored race seemed to support the presumption of an exception in favor of the negro.

Mugler v. *Kansas* (1887), 123 U. S. 623, involves the full and careful consideration of the Fourteenth Amendment with reference to the power of a State prohibiting the sale or manufacture of liquor as a beverage. The Court speaking by HARLAN, J., says: "The right to sell intoxicating liquors is not one of the rights growing out of citizenship of the United States." The sale of liquor being declared unlawful by the Legislature, and the prohibition of it held by the Court to be a valid exercise of the police power, no person was prevented by the State law from engaging in a lawful trade and occupation, and thus denied a civil right.

It will be seen that the Court is gradually coming around to the view that civil rights were guaranteed the citizens of the United States by the Constitution.

Third: Due Process of Law.

This and the succeeding clause have been more frequently invoked than the preceding clause by reason of their greater universality. This safe-guard against any unlawful encroachment upon the personal rights, is thrown around he citizen of a State by the Constitutions of nearly all, if not quite all, of the several States. The phrase "due process of law" has therefore been often construed by the State Courts, but the Federal decisions on the Amendment have, of necessity, been limited to the consideration of the supposed encroachments by a State upon the personal rights of the individual.

The requirement of the Constitution that a person cannot be deprived of his property without due process of law does not imply that all trials in the State Courts affecting property of persons, must be by jury. What is "due process of law" in the States is regulated by the law of the State: *Walker* v.

Sauvinet, *supra*, page 202.

A judge in office by virtue of an unconstitutional act, is by color of right an officer *de facto*; a person convicted of a crime by such officer is not deprived of his liberty without due process of law: *In re Ah Lee* (1880), 5 Fed. Repr. 899.

A person arrested and imprisoned under a void ordinance of a municipal corporation, is imprisoned by the State without due process of law: *In re Lee Tong* (1883), 18 Fed. Repr. 253.

The enforcement by a State, of a tax under a void law, is a deprivation of property without due process of law: *Dundee Mfg. Co.* v. *School Dist.* (1884), 19 Fed. Repr. 359. So, a person committed for contempt, for refusing to obey a subpœna issued by a County Attorney under authority of a void act, was restrained of his liberty without due process of law: *In re Ziebold* (1885), 23 Fed. Repr. 791.

An ordinance which provides that every person who resorts to, or frequents or visits any room or place where opium is sold or given away, is guilty of misdemeanor, is void. "Such an ordinance," says the Court, "puts an unlawful inhibition upon the inalienable rights and liberties of a citizen; and to commit him to prison for so doing is to restrain him of his liberty without due process of law, in violation of the Fourteenth Amendment": *In re Ah Jow* (1886), 29 Fed. Repr. 181.

In *Powell* v. *Pennsylvania* (1888), 127 U. S. 678, the Court decides what constitutes due process of law. The statute of Pennsylvania prohibited the manufacture or sale of any oleaginous substance designed to take the place of butter. The Court held that the Legislature, being the sole judge of what was injurious to the public health, the statute was a legitimate exercise of the police power of the State, and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. No person was deprived by the State of his property without due process of law.

In *Mugler* v. *Kansas* (1887), 123 U. S. 623, 660, the Court had said, "It does not follow that every statute enacted ostensibly for the promotion of the public morals, health or safety, is to be accepted as the legitimate exercise of the police powers of a State. * * * The Court is under solemn duty to look at the substance of things" If the Court may "look at the substance of things," it would seem that the legislature is not the final judge of what may constitute the police powers of a State, as indicated in the Oleomargarine Case (*Powell* v. *Pa.*)

In *Missouri Pacific Railway Co.* v. *Mackey* (1888), 127 U. S. 205, the law under consideration was an Act of Kansas passed in 1874, making railroad companies liable for all damages to an employee in consequence of the negligence of their agents, or any mismanagement of their engineers or any other employee. The Court held that, in this abrogation of the common law rule, the Act did not take the property of railroad companies without due process of law.

In *Palmer* v. *McMahon* (1890), 133 U. S. 660, the plaintiff contends that Chapter 231 of the laws of the State of New York relating to taxation, is unconstitutional, as depriving him of his liberty and property without due process of law, in that he had no notice nor oppor-

tunity to be heard, or to examine or cross-examine witnesses, or any of the protections offered under a judicial trial upon the merits. "The phrase 'due process of law,'" says Chief Justice FULLER, "does not necessarily mean a judicial proceeding." The nation from whom we import the phrase 'due process of law,' said this Court, speaking by Mr. Justice MILLER, has never relied upon the courts of justice for the collection of her taxes, * * *. The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, * * *." But the fact that the law permitted the plaintiff to object to the assessment and that assessors had *quasi* judicial powers. leads the Court to hold that the plaintiff was not deprived of his property without due process of law. And so in *Bell's Gap R. R. Co.* v. *Pennsylvania* (1890), 134 U. S. 232, it was said that the process of taxation involves no violation of due process of law, when it is exercised according to customary form and established usages.

In *Eilenbecker et al.* v. *Dist. Court* (1890), 134 U. S. 31, the District Court of Plymouth County sentenced the plaintiff in error to imprisonment in the county jail, for contempt in refusing to obey a writ of injunction issued by that Court, enjoining and restraining the defendants from selling or keeping for sale intoxicating liquors. The question was, whether or not the summary punishment for contempt by the Court, was a deprivation of the liberty of defendants without due process of law. MILLER, J., speaking for the Court says, "that this proceeding * * * is due process of law, and is the process or proceeding by which Courts have, from times immemorial, enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law."

In *Chicago, M. & St. P. Ry. Co.* v. *Minnesota* (1890), 134 U. S. 418, the Court held that the Act of Minnesota, passed March 7, 1887, creating a railroad and warehouse commission, and making the decision of the commission final and conclusive as to what were reasonable charges, was unconstitutional, as it deprived the railroad company of the right to a judicial investigation by due process of law. And this decision was reaffirmed in *Minneapolis Eastern Ry. Co.* v. *State* (1890), 134 U. S. 467.

Fourth: Equal Protection of the Laws.

The term "equal protection of the laws," has not the wide application supposed by many of those who have claimed the benefits of this inhibition against the power of the State. The majority of the decisions involving a construction of this clause have been adverse to the parties who have deemed themselves oppressed by discriminating legislation. The failure to secure the supposed benefits of this provision has been due, in most instances, to the inability to recognize the fact that laws of a special character are not necessarily a denial of the equal protection of the laws.

In *Claybrook* v. *Owensboro* (1880), 16 Fed. Repr. 297, an Act of the Legislature of Kentucky, authorized a municipal corporation to levy a tax for the benefit of the public schools within its limits, directing that the tax collected

from white people should be used to sustain schools for white children only, and the tax collected from colored people should be used to sustain schools for colored children. The Court held that the unequal benefits of the taxation was a denial of the equal protection of the laws, and that the Act was void.

In *Bowman* v. *Lewis* (1880), 11 Otto (101 U. S.) 22, the protection of this clause of the Amendment was invoked by a white citizen of the United States, and its application sought to be extended to prevent a State from arranging and parceling out the jurisdiction of its several courts as it saw fit. Mr. Justice BRADLEY, in the opinion says, the Fourteenth Amendment "contemplates persons and classes persons. It has not respect to local or municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made."

The case of *Barbier* v. *Connelly* (1885), 113 U. S. 27, is most frequently cited in this connection. A municipal ordinance of San Francisco provided, among other things, that no person owning or employed in a public laundry, should wash or iron clothes between the hours of 10 P. M. and 6 A. M. After remarking that the Amendment, broad as it is, is not designed to interfere with the police power of the State, FIELD, J., says, "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

In the *Stockton Laundry Case* (1886), 36 Fed. Repr. 611, an ordinance of the city of Stockton, California, made it an offense for any person to carry on a laundry within the habitable portion of the city, on the ground that it was dangerous to public health and safety. The Court held that this ordinance was an absolute prohibition of a useful employment, and a denial of the equal protection of the laws.

In *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356, and *supra*, page 196, a similar state of facts existed. An ordinance of the city of San Francisco gave the Board of Supervisors authority, at their discretion, to refuse permission to carry on laundries, except those located in stone or brick buildings. The Court held the ordinance unconstitutional, in that it gave the Board arbitrary power to grant or withhold permission to a person or class of persons to engage in a lawful business in any place. The Court distinguishes the case from *Barbier* v. *Connelly*, *supra;* in the latter case, the ordinance in question, prohibiting washing and ironing in public places between certain hours of the day, was held to be purely a police regulation. All persons coming within its provisions being treated alike, and subject to the same restrictions, the ordinance was not within the inhibition of the Fourteenth Amendment. But the ordinance in the *Yick Wo* case was, on its face, a denial of the equal protection of the laws, and the facts in the case demonstrated that the ordinance was exclusively and unjustly administered against a particular

class of persons.

In the principal case (*Crowley* v. *Christensen*, *supra*,) the Court distinguishes between the case at bar and *Yick Wo* v. *Hopkins*, *supra*.

The restrictive nature of the words "within its jurisdiction," was first defined in the case of *Fire Association* v. *New York* (1886), 119 U. S. 110, thus: A State imposing a heavier burden upon a foreign corporation than upon its own corporations of like character, does not come within the provision of the Fourteenth Amendment providing that "no State shall deny to any person within its jurisdiction the equal protection of the laws." A foreign corporation not having complied with the laws of the State of New York, was not a person "within the jurisdiction" of the State, and therefore could not claim the "equal protection of the laws."

The same question arose in *Pembina &c. Mining Co.* v. *Pennsylvania* (1888), 125 U. S. 181. An Act of Pennsylvania required foreign corporations not investing their capital within the State, to pay a license for keeping an office within the State. The Court says: "The inhibition of the Amendment, that no State shall deprive any person within its jurisdiction of the protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation. Under the designation 'person' there is no doubt that a private corporation is included. * * * * The equal protection of the laws which these bodies may claim, is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The State is not prohibited from discriminating in the privileges that it may grant to foreign corporations, as a condition of their doing business within its limits, provided always such discrimination does not interfere with any transactions by such corporations of interstate or foreign commerce."

In *Hayes* v. *State of Missouri* (1887), 120 U. S. 68, the statutes of Missouri provided that in all capital cases, the State should be allowed eight (8) peremptory challenges, except that, in case of cities of 100,000 inhabitants or over, the number of challenges might be increased to fifteen (15). It was held that such a provision did not deprive one indicted for murder in the Criminal Court of St. Louis, of the equal protection of the laws. "The Fourteenth Amendment," says FIELD, J., "to the Constitution of the United States, does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to be operated. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions; both in the privileges conferred, and in the liabilities imposed."

In *Powell* v. *Pennsylvania* (1888), 127 U. S. 678, the Court says that the Oleomargarine Act, "does not deny to any person the equal protection of the laws, because it places under the same restrictions, all who manufacture or sell the article embraced within its prohibition, thus recognizing and preserving the principles of equality among those engaged in the same business."

And so in *Missouri Pac. Ry. Co.*

v. *Mackey* (1888), 127 U. S. 205, "this objection seems to rest upon the theory that legislation which is special in its character, is necessarily within the constitutional prohibition, but nothing can be further from the fact."

This review of the cases involving the construction of the first section of the Fourteenth Amendment, bears witness to the fact that the Court was fully justified in its fears expressed in the *Slaughter House Cases* as to its results. "The far-reaching and pervading consequences" are indicated in the enlarged applicability of the Amendment to all persons and classes of persons. Without disregarding the universality of its provisions, the Court, in the evident hope of escaping the responsibility devolving upon them, call attention to the fact that the Amendment was particularly designed to ameliorate the condition of the colored people. Attention cannot be diverted in this manner from the general adaptation of its provisions to every citizen, whether white or black.

The door was opened a little way in the *Slaughter House Cases*, and since that time, new questions, and new phases of old questions, have forced themselves into the opening. The Fourteenth Amendment has come to be another Bill of Rights, fitted for all time and adapted to meet every emergency affecting civil liberty of the citizen. Until the respective domains of government and of the citizen have been accurately defined, and the conflicting interests of organized society and its unit, the individual, have been finally settled, the Fourteenth Amendment will afford to every citizen the opportunity to present his claims before the highest tribunal in the land.

C. H. CHILDS.

Minneapolis, Minn.

THE FOURTEENTH AMENDMENT marks the culmination of the struggle for the supremacy of the Nation over the States: 28 AMERICAN LAW REGISTER 133.

Assessment of benefits for opening streets prevented by this Amendment, unless compensation be made for the land taken: Id. 123.

Chinese queues protected from being cut off under prison regulations, as a violation of the equal protection of the laws: 18 Id. 676.

Class legislation is restrained by this Amendment: Id. 684.

Direct legislation by Congress is not authorized by this Amendment: 22 Id. 790.

Discrimination against negro and other races only partially restrained: 30 Id. 69.

Due process of law means law of the land: 25 Id. 785.

Habitual drunkards are protected by this Amendment from confinement in an asylum: 27 Id. 693.

Insolvent laws cannot operate extra-territorially without depriving non-resident creditors of their property without "due process of law": Id. 611.

Judgments rendered *in personam*, but without personal service, are rendered without "due process of law": Id. 614, 615, 620.

United States Circuit Court, Northern District of California.

IN RE CHRISTENSEN.

The Circuit Courts of the United States have discretion, in the absence of special circumstances, to refuse to issue a writ of *habeas corpus*, to take a prisoner out of the custody of the State courts until after trial and conviction, although the detention is alleged to be in violation of the Constitution and laws of the United States.

Where a person in the custody of a State court prays an appeal to the Supreme Court of the United States, on the ground of violation of the Constitution and laws of the United States by his detention, and the State judges refuse to allow his appeal, and there is no Justice of the Supreme Court of the United States at hand to apply to, a Circuit Justice will issue a *habeas corpus* and remand or release the prisoner as the law may appear.

Petition for a writ of *Habeas Corpus* to the Chief of Police of the City and County of San Francisco.

The facts of the case are stated in the opinion of the Supreme Court (*supra*, p. 190–3).

Alfred Clarke, for the petitioner.

Davis Louderback, *contra*.

SAWYER, C. J., September 4, 1890. I am always extremely desirous of avoiding any interference with the State courts in the execution of the laws, or what purport to be the laws, of the State, and do not interfere when the circumstances are such that I can find it consistent with my duty to decline action, till the State courts have, at least, had an opportunity to act.

In *Ex parte Royall* (1886), 117 U. S. 241, the Supreme Court, while holding that the Circuit Court had jurisdiction by writ of *habeas corpus*, to take a prisoner out of the custody of the State courts at any stage of the proceeding, when alleged to be held in violation of the Constitution and laws of the United States, and to summarily determine the same, further held, that where there were no special circumstances to influence its action, it had the discretion to decline

to interfere till the State courts could try the case, and even after trial and conviction, till an appeal or writ of error, where an appeal or writ of error lies, could be taken to the United States Supreme Court, and the constitutionality of the law be there regularly determined in the ordinary course of judicial proceeding. This decision gave to the circuit courts and judges in such matters, a much wider discretion than I had before supposed was vested in them.

The petitioner in this case, applied to me about a year ago, for a writ of *habeas corpus*, to discharge him from arrest under the same ordinance now involved in this case. Acting upon the decision in *Ex parte Royall*, I declined to issue the writ, not because I did not suppose it was otherwise a proper case for a writ, but because I saw no special circumstances in the case to require me to act at that time, and I therefore required him to go to the State courts for his remedy, and to pursue it, as he was entitled to do, by the regular course of proceeding on writ of error to the United States Supreme Court. The only difference to him would be in the channel through which he would reach the court of last resort. I was exceedingly averse to, unnecessarily, putting myself in antagonism to the courts, and especially the higher courts of the State, over whose action I had no appellate jurisdiction in the ordinary course of proceedings in the administration of the laws.

He went to the State courts, and after something like a year's litigation, as the petition and record show, the ordinance now in question under which he was held, was, by a *divided* court, declared to be valid not only under the Constitution and laws of the State, but also that it violated no provision of the Constitution or laws of the United States, and he was remanded to custody. The record further shows, that after this decision, the petitioner applied to the Chief Justice of the Supreme Court of the State for the allowance of a writ of error, but that the Chief Justice, notwithstanding the fact that the decision was rendered by a *divided* court, refused to allow the writ, in consequence of which he was deprived of the right guarantied to him by the Consti-

tution and laws of the United States, to have the question as to whether the ordinance does violate the Constitution or laws of the United States, reviewed by the Supreme Court of the United States—the tribunal having the jurisdiction to ultimately and authoritatively determine the constitutionality and validity of the ordinance in this particular. The Justice of the Supreme Court allotted to this circuit being absent in Europe, he cannot apply to him for an allowance of the writ of error, and he is now utterly without remedy, unless it can be had on this writ.

Under these circumstances, I do not feel at liberty under the laws of the United States, and under the decision in *Ex parte Royall*, to further decline to issue the writ, and, summarily, examine the case, even though it devolves upon me in the exercise of this jurisdiction imperatively imposed upon me, to review, and, however unpleasant it may be to me, if the ordinance is found to be unconstitutional, overrule the decision of the highest court of the State.

The ordinance requires that every party selling liquors at retail shall pay for and take out a "license at a specified rate," and that, "after January 1, 1886, no license as a 'retail liquor dealer' * * * shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the Board of Police Commissioners of the City and County of San Francisco, to carry on said business; but in case of a refusal of such consent, upon application, said Board of Police Commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco, owning real estate in the block or square in which said business of 'retail liquor dealer' * * * is to be carried on." It further makes it a misdemeanor to violate any of the provisions of the ordinance.

It also appears in the record, that the petitioner tendered the amount of his license fee, and requested the written consent of a majority of the Police Commissioners to the issue thereof, and it was refused; that there were not twelve citizens of San Francisco owning real estate in the block or

square in which he desired to carry on his business as a liquor dealer, and that it was therefore impossible to obtain the assent of twelve such citizens, and that a license was consequently refused; that proceeding with his business long before established, he was again arrested for violation of said ordinance, and he is now in custody in pursuance of such arrest.

I am myself, after due consideration, unable to take the case out of the rule laid down in the second head-note to the decision in *Yick Wo* v. *Hopkins*, and *Wo Lee* v. *Hopkins* (1886), 118 U. S. 356, which reads:

> A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality, violates the provisions of the Constitution of the United States, if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, with regard to the competency of the persons applying, or to the propriety of place selected, for the carrying on of the business.

In commenting upon the view of the Supreme Court of California, that the ordinance then in question vested "in the Board of Supervisors a not unusual discretion, in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, in view of the protection of the public against fire," the United States Supreme Court in that case, said, on page 366, 118 U. S.:

> We are not able to concur in that interpretation of the power conferred upon the Supervisors. There is nothing in the ordinance which points to such regulation of the business of keeping or conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a *naked and arbitrary* power to give or withhold consent, not only as to places but as to persons. * * * The power given to them is not confided to their discretion, in the legal sense of that term, but it is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

The language quoted is just as applicable to this ordinance as to that, then under consideration. In that ordinance it was made unlawful for "any person or persons to establish,

maintain or carry on a laundry within the corporate limits of the City and County of San Francisco, without having first obtained the consent of the Board of Supervisors," etc., and in the ordinance in this case, it is made unlawful for any person to carry on the business of a liquor dealer without a license, which could only be obtained upon the "written consent of a majority of the Board of Police Commissioners," or in default of that, upon the "written recommendation of twelve citizens," having property in the block or square where the business is desired to be carried on. What difference is there in the provisions of the two ordinances, except that the consent in the laundry ordinance is to be by the Board of Supervisors themselves, while in the liquor ordinance, the power to consent or reject is delegated by the Board of Supervisors to the Police Commissioners, or to twelve citizens of the block. If the Board of Supervisors could not confer upon, or reserve to itself this unregulated arbitrary power, it certainly, could not confer it upon the Police Commissioners, or upon private parties having no official relations whatever to the subject matter.

In the *Case of Wo Lee* (1886), 11 Saw. 429, 26 Fed. Repr. 471, this Court differed from the State Supreme Court upon the same point decided in *Yick Wo.* v. *Hopkins*, and gave its reasons for so doing at length, but in deference to the decisions of the Supreme Court of California, it yielded its own convictions, and remanded the petitioner, thinking it more seemly that the question between the State and the National courts should be authoritatively settled by the United States Supreme Court, on appeal, than to bring these subordinate courts into antagonism. The result was, both cases went to the Supreme Court of the United States. That Court quoted largely from the opinion of this Court, and approved its views. It consequently reversed the judgment of the Circuit Court, as it did of the Supreme Court of California, which this Court had followed: *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356. The decision of Justice FIELD in the *Laundry Ordinance Case* (1882), 7 Saw. 531, 13 Fed. Repr.

229, is also in point, and to the same effect. See *In re Wo Lee* (1886), 11 Saw. 429, 26 Fed. Repr. 471.

It is sought by counsel for the City, as was attempted by the State Supreme Court, to distinguish this case from the *Laundry Ordinance Case* cited, on the ground that the laundry business is a necessary business, and cannot be wholly suppressed, but only regulated, for the purposes of securing safety from fires; while selling liquors is supposed to be injurious to society *per se*, and may be wholly prohibited or permitted upon such conditions as may be prescribed—that the power to absolutely prohibit, necessarily includes the power to impose any terms or conditions, however arbitrary, no matter what, less than absolute prohibition, and consequently, that the power to grant or refuse a license may be delegated to the arbitrary and unregulated will of one or more persons, official or unofficial. I cannot as at present advised, assent to this proposition. This ordinance does not limit or regulate, or purport to limit or regulate the sale of liquors. It would seem to be upon its face—like other license ordinances—a mere revenue measure. It does not prohibit the sale of liquors, or limit their sale to any particular portion of the City, or to any number of persons, nor prescribe any qualifications whatever which shall be necessary to entitle a party to a license, or prescribe any conditions or characteristics which shall constitute a disqualification, and debar one from obtaining a license. It is not a matter of regulation at all. It simply provides that no license shall issue to any party unless he obtained the written consent of a majority of the Police Commissioners, or of twelve property holders in the same block, without indicating any conditions whatever upon which the assent may or ought to be given, or withheld. It leaves it to the absolute arbitrary, unregulated will of the persons named. They can consent to grant a license to every vagabond and disreputable person in the City, and refuse to consent to a license to every respectable person in the City. The ordinance permits and authorizes such action. It puts it in the absolute, arbitrary power of these persons, to control the whole retail liquor trade of

the City—without regard to qualifications of the parties seeking a license, or to circumstances or conditions, or the interests of society. In my judgment, an ordinance that upon its face permits and authorizes such discrimination and inequality of operation, is a violation of the Constitution of the United States. I admit the full power of the State to prohibit, limit and control the domestic liquor traffic, and to prescribe the qualifications and conditions applicable to all of those who are to be permitted to sell liquors, but this is a very different proposition from that which claims the authority to confer upon any one or more persons the arbitrary power in accordance with their uncontrolled will, to regulate these matters. It is not unlawful to deal in liquors or sell liquors at retail in California, or San Francisco, any more than it is to keep a laundry, which business also pays a license. The record shows that there are between three thousand and four thousand licensed retail liquor dealers in San Francisco. It is only made unlawful to sell liquors when you cannot obtain the written consent of a certain number of men whose action in yielding or withholding their consent is influenced by no qualifications or consideration other than their own arbitrary will, governed, perhaps, by prejudice or other unworthy motives. And that was one of the grounds upon which the laundry ordinance under consideration, was expressly and directly held by the United States Supreme Court to be unconstitutional. The police powers are the powers which come into play in the licensing and regulating of both occupations. And in both instances they operate upon the same legal principles, and they should have a similar equal and uniform application.

Under this ordinance the Police Commissioners, for anything in its provisions to restrain them, might consent to the license, as retail liquor dealers, of every immoral person in the City, while consent might be withheld from every person who is respectable and suitable for the business. If they do not do this, it is not because they are restrained

by any provisions of this ordinance. These provisions permit it.

In the *Case of the Laundry Ordinance* cited, it appeared it is true, that the gross discriminations, which the ordinance permitted, were in fact made, in its administration. These arrests for such gross discriminations, were doubtless illegal on that ground also. But the discriminations in fact made, cannot affect the validity of the ordinance itself. The ordinance was declared void, because it permitted a discrimination, not merely because its permission was in fact made available in practice. The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid, irrespective of the manner in which it is, in fact, administered. Its capability of being abused is the test.

In the case of the ordinance now in question no evidence was introduced as to the way in which it has been, in fact, administered. The case was argued, submitted, and decided upon the character, terms and provisions of the ordinance itself.

But the mode of its administration would be irrelevant to the point decided, as the question is, as to the validity of the ordinance itself, as it appears upon its face; and not whether it has been honestly or dishonestly administered. The fact that it permits arbitrary discriminations and abuses in its execution, depending upon no conditions or qualifications whatever, other than the unregulated, arbitrary will of certain designated persons, is the touchstone by which its validity is to be tested. That there are likely to be abuses, as in the case of the laundry ordinance, both as to individuals and classes, there is no reason to doubt, when an outburst of popular prejudice shall demand or countenance it; and it is also liable to be abused from more unworthy motives, considerations and influences. The ordinance should prescribe some conditions, qualifications or disqualifications, by which those who are to issue licenses are to be guided in their action, other than their own unregulated, arbitrary will.

After careful consideration, I am unable to take this ordinance out of the rule laid down in the second head-note in *Yick Wo* v. *Hopkins* and *Wo Lee* v. *Hopkins* (1886), 118 U. S. 356. As that decision is controlling, so far as this Court is concerned, I am bound to discharge the petitioner, however willing I might otherwise be to yield my individual views to the judgment of the Supreme Court of the State.

Let the petitioner be discharged.

Should the City desire to appeal to the Supreme Court of the United States, an appeal will be gladly granted. The question has reached such a state, that it is of the utmost importance that it be authoritatively decided. Until so decided the foregoing views will control the action of this Court.

(Reversed on appeal, *supra*, page 190.)

The first part of the preceding opinion by Judge SAWYER, raises the important practical question as to the time when a writ of *habeas corpus* will be issued by the United States courts for the relief of persons claiming the protection of the Constitution and laws of the United States against the action of State officials and courts. It is true that it is provided (Rev. Stat. U. S.):

"§ 755. The court, or justice, or judge to whom such application is made, shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

But it is also true that these words are modified, in their practical application, by another section of the same Thirteenth Chapter of the Revised Statutes, wherein there is this direction:

"§ 761. The court, or justice, or judge shall proceed, in a summary way, to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Upon the concluding words of this section, Justice HARLAN remarked that "What law and justice may require, in a particular case, is often an embarrassing question to the court, or to the judicial officer before whom the petitioner is brought," notwithstanding that "if, however, it is apparent from the petition, that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made": *Ex parte Royall* (1886), 117 U. S. 241, 250, citing *Ex parte Watkins* (1830), 3 Pet. (28 U. S.) 193, 201, and *Ex parte Milligan* (1866), 4 Wall. (71 U. S.) 2, 111. A little further on, the same learned Justice continued: "The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in

which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that these relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution": Id. 251.

That there might be no uncertainty, Justice HARLAN concluded: "That these salutary principles [for avoiding conflicts between State and United States courts] may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this Court holds that where a person is in custody under process from a State court of original jurisdiction, from an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty, in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him upon *habeas corpus*, in advance of his trial in the court in which he is indicted: that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State Court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte Bridges* [*infra*, page 222]": Id. 252–3.

This case of *Ex parte Royall* was a two-fold application for relief from imprisonment for selling a Virginia bond coupon without a State license and from custody, pending trial under another indictment for the same kind of action. The United States Circuit Court refused to release Royall upon the *habeas corpus*, putting him to his appellate remedies.

Classification of Cases.

There are two classes of persons who may apply for this writ; those claiming immunity from their official relations with the United States, as *In re Neagle* (1889), 39 Fed. Repr. 833 (S. C. 28 AMERICAN LAW REGISTER 585), and *Cunningham* v. *Neagle* (1890), 135 U. S. 1 (S. C. 29 AMERICAN LAW REGISTER 658); and those, like Christensen in the principal case, merely demanding protection as citizens or persons entitled to Constitutional guarantees. "It is not now the law, therefore, and never was, that every person held in unlawful imprisonment, has a right to invoke the aid of the courts of the United States for his release by the writ of *habeas corpus*. In order to obtain the benefit of this writ, and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear, upon the application for the writ, that it is founded upon some matter which justified the exercise of Federal authority, and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States": MILLER, J., *In re Burrus*

(1890), 136 U. S. 586, 591, a case where the writ was refused, because intended to restore an infant to her father from unlawful detention by her grandparents. Similarly, *Ex parte Everts* (1858), U. S. C. Ct. S. D. Ohio, 1 Bond 197; S. C. 7 AMERICAN LAW REGISTER (O. S.) 79.

Not only are there these two general classes of persons, but what is more to the particular point here under consideration, the writ of *habeas corpus* has been issued at different times in the case of each class.

United States Officers,

The *Neagle* case (1889-90, reported in 39 Fed. Repr. 833 and 135 U. S. 1 (also in full in 28 AMERICAN LAW REGISTER 585 and 29 Id. 658.) is the last of those where officers of the United States have released. The writ was issued as soon as Neagle had been committed by the Justice of the Peace at Stockton upon the preliminary hearing, charged with the murder of Terry. Neagle was discharged without further hearing or trial in the State courts. The ground of this discharge was the justification of Neagle's acts in defending Justice FIELD, by the laws of the United States, and consequently the laws of California must yield to the supreme laws of the land, that it would be useless for the State authorities to try Neagle. The dissent of Justice LAMAR (with whom Chief Justice FULLER concurred) did not go to the ground of the discharge at all.

Ramsay's case (1879), reported in 2 Flip. 451 (see 28 AMERICAN LAW REGISTER 651), shows equal promptness in relieving a Deputy United States Marshal, who had shot a prisoner in self defense. Upon Ramsey's arrest by the State authorities, he was brought up by a *habeas corpus* from the United States District Court, and after full hearing released by that Court. The State authorities then indicted Ramsey for murder, and the United States Court again released him before trial. The State court then took advantage of Ramsey's presence in the State court and ordered him into custody, from which the United States Court again immediately released him, with the remark that "having jurisdiction, the decision of this Court is binding upon the State courts. * *" This action of the United States Judge was expressly grounded upon the *Jenkins* cases and *Coleman* v. *Tennessee* (1879), 7 Otto (97 U. S.) 509. The same Judge [BALLARD] had shown equal promptness in *U. S. ex rel. Weeden et al.* (1877), U. S. C. Ct. D. Ky. 2 Flip. 76, for the relief of the deputies who merely witnessed the fatal shooting; and in *U. S. ex rel. Roberts* v. *The Jailer* (1867), Id. 2 Abb. 265, for the release of deputies killing in self defense.

Where a soldier of the United States Army had killed an escaping bushwhacker under the orders of his superior, February 2, 1865, and was afterwards tried by the State court for murder, convicted, sentenced to fifteen years' imprisonment, and had served ten months of his sentence, he was immediately released on application: *On petition of Hurst* (1879), U. S. D. Ct. Mid. D. Tenn., 2 Flip. 510.

Equally prompt was the release in *Ex parte Sifford* (1857), U. S. D. Ct. D. Ohio, 5 AMERICAN LAW REGISTER (O. S.) 659, and *Ex parte Robinson* (1855), Id. 6 McLean 355, both cases arising out of the Fugitive Slave Law. This prompt-

ness was in accordance with the precedent set for such cases by Justice GRIER in *Ex parte Jenkins* (1853), U. S. C. Ct. E. D. Pa. (reported in 2 Wall. J. 521; 2 AMERICAN LAW REGISTER, O. S. 144; and 3 Id. 208, 227. See also 28 Id. 637–9.) The same promptness was used by MILLER, J., in *U. S. ex rel. Garland* v. *Morris* (1854), U. S. D. Ct. D. Wis., 2 AMERICAN LAW REGISTER (O. S.) 348. Notwithstanding the release of Marshal Robinson in 1855, with the remark by Justice MCLEAN, "A sense of duty compels me to say, that the proceedings of the honorable [State] Judge were not only without the authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity." (6 McLean 365)—the Marshal was again arrested (1856) in a fugitive slave case, and again immediately released: 1 Bond 39; S. C. 4 AMERICAN LAW REGISTER 617.

Election Cases.

As United States Supervisors of Elections for Representatives in Congress, have power to arrest without warrant, any person interfering with an orderly registration of the voters, such an officer will be released at once if arrested by State authority under a charge of assault and battery for his manual seizure during registration of a disorderly voter: *Ex parte Geissler* (1880), U. S. C. Ct. N. D. Ill., 4 Fed. Repr. 188. Under the same power to arrest summarily for illegal voting, an immediate release was ordered of a special Deputy United States Marshal, in *Ex parte Morrill* (1888), U. S. C. Ct. D. Oregon, 35 Fed. Repr. 261.

The immediate release of the United States Marshal and District Attorney was ordered in *Ex parte Turner* (1879), U. S. C. Ct. Mid. D. Alabama, 3 Woods 603, where they had been commtited by the City Court of Selma in that State, for contempt in not producing the papers relating to the election of a Representative in Congress, The papers were in the hands of the petitioners as lawful custodians for the United States Grand Jury, and the State court could not, therefore, require them to produce the papers.

The Case of the Electoral College of South Carolina, heard in the United States Circuit Court at Columbia, November, 1876, is also an illustration of the application of this writ to cases of counting and certifying ballots for Presidential electors and members of Congress. The State Supreme Court had adjudged the petitioners in contempt, but the United States Court held the whole proceeding void, and released the petitioners. An *anonymous* and hostile review of this action of Judge BOND appeared as a leading article in the AMERICAN LAW REGISTER for March, 1877 (Vol. XV, pages 129–148), but the right to issue the *habeas corpus* at the time it was issued, was not questioned. The objection made by the anonymous writer, that the voting for both State and Congressional candidates at one time ought not to give jurisdiction to the United States Court, has since been settled in favor of that jurisdiction: *In re Coy* (1887), 127 U. S. 731, and 29 AMERICAN LAW REGISTER 349.

Revenue Officers.

The case of Corporal Lemuel J. Davis, of the Eighteenth Infantry, arose in 1876, by his detail in February of that year, as one of a

guard to aid a Deputy United States Marshal in making an arrest for violation of the internal revenue laws of the United States. By an accident, Davis' piece was discharged, mortally wounding the party to be arrested. Davis was indicted in the State court for murder, and entered into a recognizance to appear for trial. He was then released by a *habeas corpus* from the United States Circuit Court for the District of South Carolina: *Davis* v. *South Carolina* (1883), 107 U. S. 597. The case was removed from the State court, under § 643 Rev. Stat. U. S., at the time of the issuing of the *habeas corpus*, and finally reached the Supreme Court on account of the State courts persisting to assert jurisdiction contrary to law. Of the validity of the law there was admittedly no doubt, after the decision in *Tennessee* v. *James M. Davis* (1880), 100 U. S. 257 (see 28 AMERICAN LAW REGISTER 649).

It is true that the wording of § 643 Rev. Stat. U. S. required application for removal and a *habeas corpus cum causa*, "before the trial or final hearing" in the State court, but the cases are still valuable which arose under that section, because there are several steps "before the trial or final hearing," and the action of the United States court has always been as prompt to relieve the revenue officer as the State laws have been invoked for his arrest. Thus, in *State* v. *Port* (1880), U. S. C. Ct. N. D. Ga., 3 Fed. Repr. 117, as soon as the deputies had been arrested for murdering an illicit distiller, or "moonshiner," and before any hearing, the cause was removed. The State objected that there ought to be delay until an indictment had been found, but the answer was plain that "It would be hard to convince a man who was taken away from his business and family, and held in custody by a sheriff, on a lawful warrant for his arrest, duly issued by a judicial officer [a justice of the peace], upon an affidavit duly made before him, charging him with an offence against the criminal laws of the State, that no criminal prosecution had been commenced against him": WOODS, C. J., Id. 121. The defendant was discharged: Id. 133. Similar action, in a similar case, occurred in the same court, in *State of Georgia* v. *Bolton* (1882), 11 Fed. Repr. 217; and as soon as indicted, in a similar case, in *Findley* v. *Satterfield* (1877), 3 Woods 504.

Violators of National Laws.

Before passing to the second class of cases, where civilians are seeking protection against violation of their Constitutional rights, an intermediate class must be observed. It embraces persons not acting in an official capacity, but still the objects of State action for something done "in pursuance of a law of the United States." Such persons are within the purview of that section of the Revised Statutes of the United States, which provides:

"SEC. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or, being a subject

or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." This section is composed of portions of the Acts of 1789, 1833, 1842 and 1867, and its history is partially traced in 28 AMERICAN LAW REGISTER 624–53.

The leading case for this release from custody for a thing done "in pursuance of a law of the United States," is that of *Ex parte Dock Bridges*, heard at chambers in the Northern District of Georgia by Justice BRADLEY, in May, 1875, and reported at length in 14 AMERICAN LAW REGISTER 566, also in a less satisfactory form in 2 Woods 428. The act done "in pursuance of a law of the United States," was the giving of testimony before a United States commissioner under the enforcement act. The testimony was wilfully untrue, and therefore, by §5392, Rev. Stat. U. S., rendered the witness liable to fine and imprisonment for perjury at the hands of the United States judges alone, by §§629 and 711, Rev. Stat. U. S. But this perjury could not be tried and punished by the State courts, and the petitioner having been indicted in the State court, was discharged from that prosecution, though immediately arrested on a bench warrant for trial in the United States court.

In re Loney (1889), U. S. C. Ct. E. D. Va., 38 Fed. Repr. 101, arose from the arrest of the petitioner by a State officer, for perjury in a contested election for a seat in the House of Representatives of the United States. This perjury was an offense against the laws of the United States, and not of the State, and the discharge was immediate, upon the authority of *Ex parte Dock Bridges*, *supra*. On appeal, this judgment was affirmed in an interesting opinion by Justice GRAY, on the co-ordinate jurisdiction of the State courts over such crimes; on the special point of this annotation, *Ex parte Dock Bridges* was affirmed: *Thomas* v. *Loney* (1890), 134 U. S. 372.

To the preceding, should be added criminal cases arising within bounds which have been ceded by a State to the United States, together with jurisdiction over the same, as Gosport Navy Yard, in Virginia. Where the petitioner had been arrested by State authority, for a murder committed in this navy yard, he was immediately released from State jurisdiction: *Ex parte Tatem* (1877), U. S. D. Ct. E. D. Va., 1 Hughes 588.

Citizens.

In re Spickler was decided October 25, 1890, in the United States Circuit Court for the Southern District of Iowa (43 Fed. Repr. 653) upon an application to relieve from imprisonment for contempt in violating an injunction restraining the petitioner from selling intoxicating liquors. This was an "original package case" in which the forbidden sales had been made after the passage of the Wilson bill (printed in 29 AMERICAN LAW REGISTER 828), and this United States Statute was construed neither to be void nor to require the re-enactment of the Iowa prohibitory law. Hence, the petitioner was re-

manded. Near the conclusion of his opinion, Judge SHIRAS said: "Furthermore, if I entertained a doubt upon the principal question, or was in my own mind satisfied that the State court had erred in its construction of the law, I should not feel justified in releasing the petitioner from the effect of the judgment of that court. The way is open to the petitioner to present the question to the Supreme Court of the United States by a writ of error to the State court. * * I do not question the existence of the power in the United States circuit courts to grant writs of *habeas corpus*, when it is alleged that a person is deprived of his liberty by State action, contrary to the provisions of the Federal Constitution; but it is a power to be sparingly exercised. When it appears that the petitioner is held under the judgment of a State court of competent jurisdiction, before this Court should grant him a discharge, it should be made to appear that the illegality of his detention is beyond fair question; and in all cases wherein the pivotal point has not been finally decided by the Supreme Court, but still remains a debatable question, the circuit court should not discharge the petitioner, for this would be simply converting the writ of *habeas corpus* into a writ of error, by means of which this Court would be asked to review the judgment of the State court upon a debatable question of law arising under the Federal Constitution, but which it was the duty of that court to investigate and decide. In such cases, the federal question can be readily presented to the Supreme Court, and, as there exists this plain and proper remedy, it should be followed": Id. 660-1. This is in agreement with the principles laid down in *Ex parte Royall*, *supra*, p. 217.

The principle, therefore, of non-interference with the State courts, divides all applications by civilians into the two classes of uncertain declarations and of flagrant violation of Constitutional right.

In the former of these classes, the United States court will not interfere at all, or will remand the petitioner, as in *Spickler's* case (*supra*), that he may reach the Supreme Court of the United States by appeal from the highest court of the State having jurisdiction. This was done in *Ex parte Ulrich* (1890), U. S. C. Ct. W. D. Mo. 43 Fed. Repr. 661, by CALDWELL, C. J., where the petitioner alleged that he had been put twice in jeopardy on a criminal charge of bigamy. Similarly, where an agent of the Spickler already mentioned had been arrested and raised the question of what was an original package, whether the crate containing a number of bottles, or each bottle was the original package: *Allen* v. *Black* (1890), U. S. C. Ct. S. D. Iowa 43 Fed. Repr. 228. All such cases lie beyond the scope of this annotation.

The omission of the class of cases where the right is uncertain, must be understood to explain the absence of such cases as *Ex parte Hanson* (1886), U. S. D. Ct. D. Oregon, 28 Fed. Repr. 127, where the decision of Judge DEADY would now be esteemed incorrect (see 29 AMERICAN LAW REGISTER 747, 758), and the State proceeding there recognized as valid would now be declared void. None of the cases omitted in this annotation, however, expressly decide

anything with respect to the stage of the State proceeding at which the *habeas corpus* ought to issue.

An exception to the preceding principle is where the *habeas corpus* is used as a writ of error, after final hearing, as in *Barber's* case, where the writ was issued from the United States Circuit Court for the District of Minnesota, upon the petitioner's commitment to jail after conviction before a justice of the peace for having sold fresh beef which had not been slaughtered within the State (see 29 AMERICAN LAW REGISTER 807). Judge NELSON discharged the petitioner: *In re Barber*, 39 Fed. Repr. 641, and the State appealed to the Supreme Court, on the question of the constitutionality of the State fresh meat law, only to fail there: *Minnesota* v. *Barber* (1890), 136 U. S. 313. Similarly, *In re Kemmler* (1890), 136 U. S. 436. This class of cases also lies beyond the scope of this annotation, which is confined to the enquiry of the point of time, and not of the jurisdiction for the issuance of a *habeas corpus* on an allegation of the violation of constitutional rights. The jurisdiction is here assumed as undeniable, and its exercise after final hearing in the State court scarcely presents a separable subject; often the issuance of the writ is then a matter of speedier determination than could be obtained by an appeal: *Ex parte Kieffer* (1889), U. S. C. Ct. D. Kan., 40 Fed. Repr. 399. The citation was another dressed beef case, and Judge (now Justice) BREWER remarked that "At the outset we are met by this question: Is this a case in which the writ of *habeas corpus* should be allowed, even though these ordinances [of the City of Topeka] be deemed invalid? The cases of *Ex parte Royall* (1886), 117 U. S. 241, and *Ex parte Fonda* (1886), Id. 516, affirm that there is a discretion in the Federal courts in the matter of *habeas corpus*, both before and after trial and judgment in the State court; and, in cases in which the act under which the prosecution is had, is challenged as in conflict with the Federal Constitution. The Court, in one—perhaps both—of these opinions declares it not to be assumed that the State courts will not adminster the law correctly, and accord to the party all the rights guaranteed to him by the Federal Constitution. Therefore it is often the proper way to decline to allow the writ, leaving the party to enforce his rights in the State courts. So, it is argued that, if it be true that these ordinances are in conflict with the Federal Constitution, the petitioner has his remedy. He can appeal his case from the police to the district court; from there to the Supreme Court of the State; and from thence to the Supreme Court of the United States. * * * But that is not the only consideration. If these ordinances are invalid, they are invalid because of an attempt to interfere with commerce, and prevent the free exchange of commodities between the citizens of another State and those of this City. Few persons can stand the expense of litigation running through that channel to the Supreme Court. Length of time must pass before the judgment of that Court could be obtained. In the meantime, if those ordinances are enforced,—not only against the petitioner, but against whoever may see fit to engage in this business—there is an interference with the exchange of

commodities between the citizens of other States and those of this City; and the result will be to stop such traffic. Now, when that would be the natural result, when that is declared to be the intended purpose of this legislation, this Court may, in the exercise of its discretion, properly hold, after a case has been passed to judgment in the State court, that the party has a right to a speedy enquiry and determination in the Federal court, as to whether such ordinances are in conflict with the Constitution of the United States. The public, as well as the individual, are interested in a speedy settlement of this matter": Id. 400–1.

Hence, in a case similar to Christensen's, the hearing was had upon an informal rule to show cause why the *habeas corpus* should not issue, to relieve from imprisonment under sentence for selling liquor without a license. The writ and the petitioner's discharge were refused, as license laws did not as a class violate the Fourteenth Amendment: *In re Hoover* (1887), U. S. D. Ct. S. D. Ga., 30 Fed. Repr. 51.

In the second of the two classes of cases where a civilian applies for a *habeas corpus* for a flagrant violation of the Constitution, are included many different cases where the United States courts act with great promptness, as will now be exemplified.

Extradition Cases.

In re Reinitz (1889), U. S. C. Ct. S. D. N. Y., 39 Fed. Repr. 204, was a hearing upon *habeas corpus* of the petitioner, who had been extradited to New York City from Queenstown, Ireland, on a charge of forgery, had been acquitted, and was arrested in a civil action for moneys wrongfully converted to his own use, as he was leaving the court house after his acquittal. The *habeas corpus* was immediately issued under § 752 Rev. Stat. U. S., and the petitioner was released, as he had not had a reasonable time to return to Ireland before his arrest. This is in strict agreement with the principles deduced by the late Justice MILLER, in *U. S.* v. *Renscher* (1886), 119 U. S. 407, 431, following *Ex parte Royall* (1886), 117 Id. 241, 251.

Besides extradition cases proper, there is a more numerous class of surrender by one State executive to that of another, which is by virtue of the Constitution and laws of the United States, and if wrongful, may be remedied by *habeas corpus* from the United States courts. *State of Tennessee* v. *Jackson* (1888), U. S. D. Ct. E. D. Tenn., 36 Fed. Repr. 258, is a striking instance of the fraudulent abuse of this power, and also of the summary relief to be obtained. The petitioner was delivered up by the Governor of Illinois on a requisition by the Governor of Tennessee, based upon a false affidavit that the petitioner was a fugitive from Tennessee, when, in fact, he had never been in the State. The case originated in the sale of a horse, but that is immaterial, as the action of the Court was based upon the whole proceeding having been "a fraud upon the law." As soon as the petitioner had been carried into Tennessee and committed to jail for a hearing, the *habeas corpus* issued and the release followed. It does not appear whether the detective who made the false oath and imposed on both Governors, suffered the just pun-

ishment of his crime, or not. The writ went out quite as promptly in a case of actual abduction—*In re Mahon* (1888), U. S. D. Ct. D. Ky., 34 Fed. Repr. 525—but the discharge was refused, as the petitioner had been arrested on his arrival in the State, by a bench warrant. The petitioner had taken part in the Hatfield-McCoy outrages along the West Virginia border line, and raised no question of innocency. To much the same effect is *Ex parte Ker* (1883), U. S. C. Ct. D. Ill., 18 Fed. Repr. 167, the petitioner having been abducted from Peru and carried into California, and from thence removed to Illinois upon a requisition of the Governor. Similarly *Ex parte Brown* (1886), U. S. D. Ct. N. D. N. Y., 28 Fed. Repr. 653.

The writ issued from the United States District Court for the Southern District of Georgia, as soon as the petitioner had been arrested in that State where he was found: *Roberts* v. *Reilly* (1885), 116 U. S. 80; though the contention was upon the regularity of the papers accompanying the requisition. Similarly, *Ex parte Morgan* (1883), U. S. D. Ct. W. D. Ark., 20 Fed. Repr. 298, where the contention was over the right of the Chief of the Cherokee Nation to make a requisition.

A commercial traveler was delivered from an awkward position by this writ, immediately upon his arrest upon suspicion as a forger fleeing from Kansas. Though there were no papers and no requisition, a police justice of Richmond, Va., took upon himself to commit the petitioner to jail, upon hearsay only, to await action of the Criminal Court of that City: *Ex parte McKean* (1878), U. S. D. Ct. E. D. Va., 3 Hughes 23. United States District Judge HUGHES, while releasing the petitioner, was, however, so far forgetful of the duty of the courts to preserve individual liberty, as to overlook the petitioner's positive averments in his petition for the writ, that he was "wholly innocent"; in fact, the release was ordered for these technical reasons only: "If the committing magistrate were merely holding this prisoner from day to day, awaiting such testimony as the law required, I should remand the prisoner to him and await his final action; because it is customary, as an act of comity between States, that, in such cases, a reasonable time shall be allowed for sending on the requisite proofs of the crime and of the charges from the State where the crime was committed. But it seems that the magistrate has taken final action in the matter, and exhausted the powers intrusted to him by the State law, so that the prisoner is before me on the validity of the *mittimus*, which is made part of the return of the jailer of Richmond to the writ of *habeas corpus*": Id. 26.

In respect to arrest upon suspicion, the case just cited had a counterpart in *Ex parte Joseph Smith* (the Mormon Prophet), who was arrested in Illinois in 1842 upon a charge of being accessory before the fact of a murder committed in Missouri. There was no charge, no legal proceeding in Missouri, only an affidavit presented to the Governor, and his demand upon the Governor of Illinois. Judge POPE, sitting in the U. S. C. Ct. D. Ill., discharged Smith at once: 3 McLean 121.

The writ will issue as soon as ap-

plied for, although such a writ has been asked from the State Court and refused and an appeal with *supersedeas* taken to the higher Court of the State by the petitioner: *In the matter of John Leary* (1879), U. S. D. Ct. S. D. N. Y. 10 Ben. 197, 202.

Generally, the writ must go out as soon as applied for, in a proper case, or else the petitioner would be likely to be removed from the jurisdiction. For further instances see *In re Keller* (1888), U. S. D. Ct. D. Minn., 36 Fed. Repr. 681.

Besides the alleged criminal, the agent of the State from which the requisition comes may need prompt relief; hence, the writ issued (though the petitioner was finally remanded), as soon as he was arrested for kidnapping a citizen named Blair under the color of requisition papers from Illinois: *In re Bull* (1877), U. S. C. Ct. D. Neb., 4 Dill. 323. Equally prompt was the release from arrest in an action brought against the agent of the State of Arkansas, for malicious prosecution, by the party wanted in Arkansas. The requisition was upon the Governor of New York, who issued his mandate to the Sheriff of Kings County, New York, to arrest the alleged criminal. The Sheriff made the arrest, but before he could deliver the prisoner to the agent, a Justice of the Supreme Court of New York issued a *habeas corpus* and released the arrested party. The petitioner, as a ministerial officer, was therefore entitled to his discharge immediately: *Titus's Petition* (1876), U. S. D. Ct. S. D. N. Y., 8 Ben. 419.

Void Arrests by State Authority.

In *Wildenhus's Case* (1887), 120 U. S. 1, on appeal from the refusal to discharge, by the United States Circuit Court for the District of New Jersey (28 Fed. Repr. 924), Chief Justice WAITE, speaking for the Court, saw no reason why a foreign consul might not immediately enforce his rights under a treaty and procure the release from arrest by the local authorities of a seaman who had committed an assault upon the foreign vessel without disturbing the peace of the port. As the assault had resulted in death, the Court thought this disturbed the peace of the port, and therefore refused the discharge.

Similarly, Circuit Judge CALDWELL immediately released sellers of liquor in "original packages," upon their arrest for violating the State liquor laws: *In re Beine et al.* (1890). U. S. C. Ct. D. Kan., 42 Fed. Repr 545. This was between the decision in *Leisy* v. *Hardin* (1890), 135 U. S. 100 (29 AMERICAN LAW REGISTER 497), and the approval of the Wilson bill (Id. 828).

Commercial travelers, or "drummers," also secure prompt attention, when arrested under State statutes: *In re Rudolph* (1880), U. S. C. Ct. D. Nevada, 2 Fed. Repr. 65, though in this case the petitioner was erroneously remanded: *Robbins* v. *Taxing District* (1887), 120 U. S. 490, and 29 AMERICAN LAW REGISTER 747. In the place cited from the AMERICAN LAW REGISTER, it will be observed that counsel did not use this writ as freely as they might have done for prompt relief.

Immigrants also find prompt relief from detention under State statutes void for attempting to regulate foreign and interstate commerce: *In re Ah Fong* (1874), U. S. C. Ct. D. Cal., 3 Sawyer 144, which was decided by Justice FIELD in the Circuit Court in respect to one pas-

senger by the steamer Japan by a denial of the Constitutionality of a statute of California, which Justice MILLER styled in "a most extraordinary statute," while releasing another passenger who had foolishly sought justice through the courts of the same State and only obtained relief by appealing to the Supreme Court of the United States: *Chy Lung* v. *Freeman* (1876), 2 Otto, 92 U. S. 275, 277. (See also 29 AMERICAN LAW REGISTER 459, 465.) On this appeal, the State authorities were wise enough not to appear before the Supreme Court of the United States; which affords a most convincing proof of the importance of the Fourteenth Amendment and the writ of *habeas corpus* authorized by its provisions.

With equal promptness, the petitioner was released by Circuit Judge SAWYER from arrest for violating the latest of the laundry ordinances: *The Stockton Laundry Case*, *In re Tie Loy* (1886), U. S. C. Ct. D. Cal., 26 Fed. Repr. 611, which should not be confounded with the equally prompt action in a similar case by Justice FIELD: *The Laundry Ordinance Case*, *In the matter of Quong Woo* (1882), U. S. C. Ct. D. Cal., 13 Fed. Repr. 299. There was a similarly prompt action by District Judge DEADY: *In re Wan Yui* (1885), U. S. D. Ct. D. Oregon, 22 Fed. Repr. 701.

More reasonable laundry regulations were promptly, though favorably, examined, and the prisoner remanded, in *Soon Hing* v. *Crowley* (1884), 113 U. S. 703, wherein *Barbier* v. *Connolly*, Id. 27, was followed as to the constitutionality of the local ordinance.

An earlier case arose from the arrest and binding over to answer in a State court of the President of the Sulphur Bank Quicksilver Mining Co. (a California corporation) for violation of the Constitution of that State (Art. XIX, §2), and §§178 and 179 of the Penal Code, forbidding the employment by any corporation of any Chinese or Mongolian. Such a mandate being in contravention of the Constitution of the United States, the petitioner was immediately released without being put to his trial in the State court: *In re Tiburcio Parrott* (1880), U. S. C. Ct. D. Cal., 1 Fed. Repr. 481.

Again, a petitioner was immediately relieved from arrest for refusing to testify before the county attorney: *In re Ziebold* (1885), U. S. C. Ct. D. Kan., 23 Fed. Repr. 791, the State law authorizing such arrest being declared void. The same promptness of release occurred where the petitioner had been only arrested under a municipal ordinance against gaming and gambling houses, this ordinance being beyond the municipal power to enact: *In re Lee Tong* (1883), U. S. D. Ct. D. Oregon, 18 Fed. Repr. 253.

The necessity of such a speedy remedy can be seen from *U. S.* v. *Spink* (1884), U. S. C. Ct. E. D. La., 19 Fed. Repr. 631, where the United States Circuit Court had enjoined certain defendants from prosecuting the petitioner for piloting vessels without a State license. Defying the injunction, the defendants could have felt the strong hand of the court, but could not stop the action of the State laws. Of course, the circuit and district judges are not infallible (See *Francis* v. *Flinn* 1886, 118 U. S. 385) any more than State judges, but the people and the States, by proper exercise of Constitutional machinery, have preferred the judgment

of the former, with a direct appeal to the Supreme Court of the United States, to the slower method of proceeding through the State courts and ultimately to the Supreme Court of the United States. Another striking instance, and one, too, where the United States District Judge erroneously refused to release the petitioners, was *Ex parte Forbes et al.* (1870), U. S. C. Ct. D. Kan., I Dillon 363, where Forbes and Pucket had been confined by the State Court for disobeying its injunction in a case over which it had no jurisdiction. "Access to the Federal judiciary" was refused because the United States Statute (February 5, 1867, 14 Stat. at Large 385, and now incorporated in the Revised Statutes) only "gave power to grant the writ [of *habeas corpus*] 'in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States' * * since they [the Federal judiciary] can administer no relief, unless the case is provided for by federal legislation." Such is not the interpretation of the law.

Cases where a bankrupt is arrested by State process, after or even before his discharge, as *In the matter of Valk* (1869), U. S. D. Ct. S. D. N. Y. 3 Ben. 431, are not considered here, as falling within the exercise of the distinctly different Constitutional power, "to establish * * * uniform Laws on the subject of Bankruptcies throughout the United States."

Void Convictions in State Courts.

In re Ah Jow (1886), U. S. C. Ct. D. Cal. 29 Fed. Repr. 181, was an instance of release immediately upon conviction for "visiting a room kept, in the City of Modesto, by another, where opium was sold," that act being made an offense without regard to lawfulness or otherwise of such visit. The Court expressly followed the principle of *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356. Similarly, in *Ex parte Yung Jon* (1886), U. S. D. Ct. D. Oregon, 28 Fed. Repr. 308, the petitioner was heard and remanded, in case of a conviction for selling opium under a State law supposed to deprive the owner of opium of his property without due process of law, the law being held valid. And another laundry case (in the City of Napa) resulted also in the immediate release of the petitioner, who did not seek the protection of the United States court until after his imprisonment had begun: *In re Sam Kee* (1887), U. S. C. Ct. N. D. Cal., 36 Fed. Repr. 680.

There was equal promptness, though with an opposite result, where the title of the trial judge was unsuccessfully impeached to secure the release of a murderer: *In re Ah Lee* (1880), U. S. D. Ct. D. Oregon, 5 Fed. Repr. 899. *In re Wong Yung Quy* (1880), U. S. C. Ct. D. Cal., 2 Fed. Repr. 624, was a similar case of a conviction for removing a dead body without a permit.

Ex parte Kenyon (1878), U. S. C. Ct. W. D. Ark., 5 Dillon 385, was a case of immediate release from conviction and sentence for larceny, rendered in a court of the Cherokee Nation, in Indian Territory. *Ex parte Dock Bridges* was the principal authority relied upon for such prompt action, where the facts disclosed no jurisdiction over a husband charged with stealing the personal property of his deceased wife, no administration having been raised on her estate.

The recent case of *Ex parte Ul-*

rich (1890), U. S. D. Ct. W. D. Mo. 42 Fed. Repr. 587, is an illustration of forbearance without any good result, and therefore no proper obedience to the mandate, that the court should "thereupon dispose of the party as law and justice require." The petitioner was arraigned in State criminal court of Jackson county, Missouri, upon a charge of bigamy, and the trial was begun, but first suspended to allow another trial of another person, and finally stopped and continued to another day without the consent of the prisoner. The petitioner then petitioned the United States District Judge for a *habeas corpus*, but "I deferred action, suggesting to the petitioner's counsel, that nothing short of a sense of the supreme necessities of the prisoner's condition, could induce my interference. I preferred to wait and see whether or not the State court would again attempt to put him to trial before another jury." At his second trial, the petitioner pleaded that he was being put twice in jeopardy, but the State court went on to try, convict and sentence. Again the United States Judge "postponed the writ until after the hearing of the motion for a new trial" of a man who could not be tried at all on that charge. The excuse for this delay is that such a motion for a new trial "is recognized by the Supreme Court of the State, as the due and golden opportunity of the trial court, on calmer deliberation, to rectify its errors committed in the progress of the trial." So, very tardily, the petitioner was released after being illegally confined without bail, from April 26 to June 23, 1890, the United States Judge remarking: "True it is, the remedy yet remains to the prisoner, to prosecute an appeal or writ of error to the State Supreme Court. The [State] Supreme Court would not, however, grant the prisoner the speedier relief by *habeas corpus*, as in such cases it only takes cognizance by writ of error or appeal. At this juncture of the case, I recall the utterance of Homer, that 'on the first day of his servitude, the captive is deprived of one half of his manly virtue.' Each hour of the petitioner's illegal restraint is not only a degradation in its tendency, but it is a crime against liberty. The Supreme Court will in a few days adjourn until October next. Under the most favorable circumstances, no relief in that direction can possibly come to the petitioner for four months. He may be unable to obtain bail. Must he lie in jail, and go to the penitentiary, in violation of his constitutional right to be set free? Being invested with plenary jurisdiction for his protection, to fail to exert the power from an over-scrupulous regard of the course of procedure in the State courts, would be as timorous, as it would be indefensible."

There was no delay in *Ex parte Houghton* (1881), U. S. D. Ct. D. Vt., 7 Fed. Repr. 657, when the petitioner had been convicted in a State court of passing counterfeit national bank bills. He was released, on application, not because the *habeas corpus* was "a proceeding for relieving criminals at all from just punishment," but "from punishment contrary to the laws of the United States," to which he was still liable: WHEELER, D. J., Id. 665. The action of the District Judge in *Cæsar Griffin's Case* (1869), U. S. C. Ct., D. Va., Chase's

Dec. 364, was reversed for quite other reasons than the mere release of one convicted in the State court, the question there elaborately considered by Chief Justice CHASE being the effect of the disability of a State judge under the third section of the Fourteenth Amendment, providing that "no person shall * * hold any office, civil or military, * * under any State, who, having previously taken an oath as a member * * * of any State legislature, * * to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

Of course, *Ex parte Fonda* (1886), 117 U. S. 516, can be cited in defense of the tardy action just criticised. Chief Justice WAITE declared the principles of *Ex parte Royall* (*supra*, page 217,) did not require the Supreme Court of the United States to interfere for the release of an embezzler from a national bank, simply because he had been tried in a State court and had not yet appealed to the State Supreme Court. He added that "no reason is suggested why the Supreme Court of the State may not review the judgment of the circuit court of the county upon the question which is raised as to the application of the statute, under which the conviction has been had, to embezzlements by servants and clerks of national banks; nor why it should not be permitted to do so without interference by the courts of the United States." As the question of jurisdiction is still unsettled (see *U. S.* v. *Buskey*, 1889, U. S. C. Ct. E. D. Va., 39 Fed. Repr. 99; *Hoke* v. *The People*, 1887, 122 Ill. 511, and *State* v. *Cross et al.*, 1888, 101 N. C. 770), this utterance of Chief Justice WAITE may well be distinguished as having been made in a case of uncertain declaration of the accused's Constitutional right to be tried exciusively in the proper United States court. It may be well to add, that similar cases arising in the United States courts are governed by another principle; that is, there must be a lack of jurisdiction or subsequent power to hold the petitioner under the sentence: GRAY, J., *Ex parte Wilson* (1885), 114 U. S. 417, 421 and citations; BLATCHFORD, J., *Ex parte Snow* (1887), 120 U. S. 274, 286.

The main purpose of the preceding annotation has been to indicate a rapid process for relief in cases falling within the jurisdiction of the United States courts. Commercial travelers, and even mere pleasure seekers, may fall into the meshes of State laws administered without much regard to the decisions of the United States Supreme Court, and with such clients, the necessity for speedy action is as great as its success is pleasing.

Again, it is important to observe that the use of *habeas corpus* is not liable to that abuse which might exist, if an appeal could not be taken to the Supreme Court of the United States, either by the State or the petitioner. This equal right of appeal secures uniformity in the decision of Constitutional claims, and prevents the local United States judge from degenerating into a petty tyrant either towards the local State authorities or the petitioner.

JOHN B. UHLE.